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CHARLES ELMORE CROPL
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No. 194

IN THE

UNITED STATES SUPREME COURT

MARY P. FINLAYSON and D. A. FINLAYSON, her husband,

Appellants,

vs.

TOWN OF MONTICELLO, a municipal corporation under the laws of the State of Florida,

Appellee.

BRIEF OF APPELLANTS ON MOTION TO DISMISS OR AFFIRM

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TABLE OF CASES CITED HEREIN

A. C. L. Ry. vs. City of Lakeland
94 Fla. 347, 115 So. 669

City of Fort Myers vs. State of Florida, et al
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Combes vs. City of Coral Gables
168 So. 524, 124 Fla. 374

Finlayson vs. Town of Monticello
137 Fla. 697, 189 So. 21

Gulfview Apartments, Inc. et al vs. City of Venice
108 Fla. 41, 145 So. 842

Lots 1685 et al vs. Town of DeFuniak Springs
174 So. 29, 127 Fla. 348

Morgan vs. United States
298 U. S. 468, 56 S. Ct. 906, 911, 80 L. Ed. 1288

TABLE OF STATUTES CITED HEREIN

Chapter 9298, Laws of Florida, Acts of 1923, Sec. 2 et seq.
Florida Statutes 1941, Section 170.01 et seq.

OFFICIAL REPORTS OF THE DECISIONS ON THIS CASE

Finlayson vs. Town of Monticello
137 Fla. 697, 189 So. 21

Town of Monticello vs. Finlayson
17 So. 2nd 84, (not yet reported in Fla. reports)

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STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The resolutions of the governing authority of the municipality of the Town of Monticello levying the assessments were without the authority of the statute Chapter 9298, Laws of Florida 1923, alleged in the Bill seeking to foreclose the alleged assessment liens as the authority for adopting the resolutions making the assessment, because of the failure of the governing authority of the municipality to obtain authority to use said statute for the purpose of levying the assessment without having first performed certain affirmative action, more specifically set out in the following brief, prescribed as jurisdictional prerequisites to be complied with before the municipality could use the statute to make the assessments. That, therefore, the

assessments were without authority of law and, if enforced, would result in depriving the appellants of their property without due process of law, in violation of the XIV Amendment of the Constitution of the United States. The validity of these resolutions having been upheld by the Supreme Court of Florida, notwithstanding the want of law for adopting them, and thereby constituting them, as adopted, in violation of the XIV Amendment of the Constitution, this holding as to the validity of the resolutions, we contend, is a fit subject of jurisdiction of the Supreme Court of the United States.

HISTORY OF THE CASE

The proceeding was instituted by Bill of Complaint filed by the Town of Monticello, a municipal corporation of the State of Florida, in the Circuit Court of Jefferson County, Florida. The relief sought was the foreclosure of alleged special improvement liens arising from three paving programs affected in 1925 and 1926. Authority for the paving and special assessments against abutting property was alleged in the Bill to be Chapter 9298, Laws of Florida, Acts of 1923, or as brought forward in Florida Statutes 1941, *Section 170.01 et seq.*

The Answer specifically denied that any authority had been acquired under the law as alleged in the Bill because certain jurisdictional prerequisites, prescribed by the statute to be complied with before the municipality could obtain the authority of the statute to make the assessments, had not been complied with, which constituted the main defense going to the whole action.

Issue being joined, the matter was referred to a Special Master to take the evidence and make findings of law and fact. Special Master made no finding on this main issue, but found the liens of such special assessments to be valid, and the obligations secured thereby to be in default and recommended that upon failure to pay the amounts determined to be due, foreclosure be ordered. The defendants, appellants here, filed exceptions to the report based on the failure of the Master to find on the main issue above mentioned and, upon a hearing of the same, the Circuit Court sustained the exceptions to the Master's Report and proceeded to make a finding on that issue, and finding the facts as alleged in the Answer to be true, ordered the Bill dismissed. The plaintiff, (appellee here) appealed from

this Order or decree to the Supreme Court of Florida, where a reversal was entered and decree ordered to be entered in favor of plaintiff.

An appeal to the United States Supreme Court, from this Order, is now sought.

ARGUMENT

(All italics occurring in this Argument are ours, unless otherwise noted.)

I.

The Court will readily see, we believe, how completely the Appellee has mis-stated the Federal question involved, and to be considered, in this Appeal in its Motion to Dismiss or Affirm. The question, we think, is clearly indicated in Appellants' Assignment of Error (original transcript of the record P.....8.6.....) and may be briefly stated.

The resolutions of the governing authority of the municipality levying the assessments were without authority of the statute because of the failure of the governing authority of the municipality to obtain authority to use the statute for the purpose of levying the assessments without having first performed certain affirmative action prescribed as jurisdictional prerequisites to be complied with before the municipality could use the statute to make the assessments. That, therefore, the assessments were made without authority of law and, if enforced, would result in depriving these appellants of their property without due process of law, in violation of the XIV Amendment of the Constitution of the United States.

Those jurisdictional prerequisites require that there must be held a hearing, after due notice of such hearing, at which evidence, competent and of probative value sufficient to establish the fact of the actual special benefit that would accrue to the assessed property from the public improvement sought to be undertaken under the authority of the Act, must be introduced and considered, and from such evidence, after such hearing, there must be a finding of the amount of special benefit that would be prorated

among the various pieces of property to be assessed, and the actual amount of the benefit to be received by each piece of property determined, before such governing authority could act under the authority of the statute and levy an assessment against such property.

This clearly appears from the following citations interpreting Section Two (2) of the statutes by the Supreme Court of the State of Florida in several cases, which holdings form a complete, clear and unequivocal interpretation of the section, and are as follows:

> "Special Assessments for local improvements although resting on the taxing power are distinguishable in many respects from a general tax imposed for state, county, or municipal purposes. The fair and just foundation on which special assessment for local improvements rests, is *special benefits accruing to the property benefitted,* that is to say, benefits received by it, in addition to those received by the community at large." City of Ft. Myers v. Florida, et al, 95 Fla. 704, at page 721-22 of the opinion, 117 So. pages 97-104.

And at page 98 the Court, in the same opinion, says:

> "Under Chapter 12719 Acts of 1927" (or its prototype 9298 Acts 1923) "it is mandatory *that before the resolution authorizing public improvements provided in subsection B"* (or Section 3, 1923 Acts) *"can be legally adopted* the city commission must have determined that benefits will accrue to the property improved, *the amount thereof,* how such benefits will be *prorated* and *that Special Assessments will be made in propor-*

tion to said benefits as directed by Subsection A"
7 Hdnt. Id.

And the Court in an opinion by Mr. Justice Buford (Lots 1685 et al vs. Town of DeFuniak Springs, 174 So. 29, 127 Fla. 348) says:

> "It is contended that the bill of complaint fails to allege the adoption and publication by the town's governing authority of a resolution determining that benefits would accrue to the property, *the amount of the benefits, that the special assessment would be made proportionate to the benefits, and that they would not exceed the benefits.*"
>
> "This contention is well founded for the bill of complaint does not contain any allegation relating to this *prerequisite jurisdictional resolution.*"
>
> • • • •
>
> "It is mandatory that a resolution in conformity with this statutory requirement be adopted, City of Ft. Myers v. State of Florida, 95 Fla. 704, 117 So. 97."

And in speaking of the resolution, in the Ft. Myers case Supra, the Court says:

> *"The resolution on its face does not show any specific finding of benefits to the property improved or that such benefits were equal to* or (not) *less than the special assessments. We think such a finding was mandatory."*

And in the Ft. Myers case supra, the Court says:

> "The resolution of June 3, 1927, resolves to make

'public improvements of paving and to construct concrete curb and gutter, together with the necessary storm sewers, catch basins, manholes and accessories.' It also determined to prorate the benefits to be derived from such improvements by the front-foot rule. Section Fifty of Chapter 12719, Acts of 1927, being the Act under which the commissioners proceeded, commands that in no instance shall the amount assessed against the benefited or abutting property exceed the amount of the benefits estimated to accrue to said property. *The resolution on its face does not show any specific finding of benefits to the property improved or that such benefits were equal to* (or not) less than the special assessments. We think such a finding was mandatory."

And again in the Ft. Myers case supra, the Court says:

"In some jurisdictions, it is the rule that special or peculiar benefits actually accruing *and determined after a notice and hearing is essential to the validity of a special assessment,* while, in other jurisdictions, it is held that the presumption of special benefits grounded upon a legislative determination thereof is sufficient to justify an assessment in proportion to the front footage or according to any other fair and reasonable rule. Dillon on Municipal Corporations, 5th Edition, Volume 4, page 2615. *The statute under consideration is controlled by the former rule."* 17th Hdnt. City of Ft. Myers vs. State of Florida supra.

And in A. C. L. Ry. vs. City of Lakeland (94 Fla. 347, 115 So. 669) the Court says:

"Whether private property which is assessed or to be assessed for any part of the costs of a proposed or fully completed public improvement is *in fact specially benefitted by the paving* of a street on which the property assessed or to be assessed abutts or by any other local public improvement is a question to be ascertained and established as any other fact may be established, that is to say, *by competent evidence of probative value* sufficient to establish the fact; it does not rest in the mere assertion of the municipal authorities." Atlantic Coast Line Railroad Co. vs. City of Lakeland Supra 2nd Hdnt.

And in the Ft. Myers case supra at pages 104-5 So. Rep., the Court says:

"For all the record here discloses the rule as announced in the preceding paragraph was completely ignored. The assessments seem to have been predicated on the cost of the improvement rather than on the amount of benefits prorated and if any benefits were determined they were predicated on assessments rather than actual increase in value to the lands improved. *We think it imperative under the applicable statute that there must have been a specific finding of benefits that the assessments made were not in excess of the benefits found and that any assessment imposed without regard to the benefits found is arbitrary and invalid.* Walsh v. Barron, 61 Ohil St. 15, 55 N. E. Rep. 164; Doughton v. Camden, 72 N. J. L. 451, 63 Atl. Rep. 150; Simmons v. City of Passaic, 42 N. J. L. 524; Cronin v. Jersey City,

38 N. J. L. 410; Signer v. Fuller, 34 N. J. L. 227; Essen v. Common Council of City of Cape May, 77 N. J. L. 361; 72 Atl. Rep. 49; Hutchinson v. Storrie, 92 Tex. 685; 41 S. W. Rep. 848; Kettle v. Dallas, 35 Tex. Civ. Appl. 632, 80 S. W. Rep. 874."—

A description singularly applicable to the Monticello proceedings.

As to the significance of the word "hearing" used in similar circumstances, this Court has this to say in an opinion by Mr. Chief Justice Hughes, in the case of Morgan vs. United States, 298 U. S. 468, 56 S. Ct. 906, 911, 80 L. Ed. 1288:

> "The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument."

At another point in his decision in the above cited case, Mr. Chief Justice Hughes observes:

> "That duty is widely different from ordinary executive action. It is duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of facts. Nothing can be treated as evidence which is not introduced as such."

The Supreme Court of Florida has never receded from the holdings above set out, but, on the other hand, inferentially endorses them in its opinion in the instant case, by way of confession and avoidance, when in the opinion, after saying:

> "The Chancellor held the view that the evidence introduced by plaintiff was insufficient to meet the rule announced in the Fort Myers case,"

it says;

> "That *controversy* is readily distinguishable from this one for reasons given in our opinion, Finlayson vs. Town of Monticello, 137 Fla. 697, 189 So. 21";

The controversy is identical; the controversy in each case was whether the jurisdictional prerequisite prescribed by the statute had been complied with before proceeding to levy the assessment, as the record indisputably shows.

II.

CASES CITED BY APPELLEES IN MOTION TO DISMISS OR AFFIRM

The cases cited by Appellee in its Motion to dismiss or affirm have no bearing on the Federal question involved in this appeal.

They either relate (1) to cases where the assessment itself is made under authority of law and there is no question of that authority, but in its operation the assessment affects rights peculiar to a property owner, who does not object within the proper time—the assessment not being void as a whole but only voidable; (2) where special statute itself provides for a *post facto* hearing on the validity of the assessments; or (3) where there is a legislative determination, contained in the statute itself, of benefits.

1. The validity of the assessment *as a whole* is questioned in this appeal and not the peculiar rights of any particular property holder, except as affected ultimately by the enforcement of the void assessment.

2. The statute does not place upon the affected property owner, where above mentioned jurisdictional prerequisites have not been complied with but nevertheless the assessment has been levied, the burden of invalidating the assessment. A hearing before an equalizing board, provided for by a void resolution, held for the purpose of equalizing among the pieces of assessed property a void assessment, could not be so construed. The meeting of such a board is just as unauthorized by law as the resolution making the assessment and ordering a hearing.

The provisions of this Section Two (2) of Chapter 9298, as construed by the Supreme Court of Florida, as here-

inbefore set out, is constituted a barrier, by the statute, from public policy, to protect all municipal property in the state from arbitrary assessments and from any burden being put on the property owner to protect himself against the unwarranted use of the taxing power of the state, except when there should be some attempt to enforce the void assessment, and to safeguard the constitutional rights under both State and Federal constitutions, by providing (1) that the assessment must be in proportion to, that is, not in excess of, actual special benefit accruing to the property from the improvement; and (2) that the *amount of* that special benefit must be *pre-determined before* the municipality can avail itself of the provisions of section 3 of the act; a barrier which cannot be ruthlessly brushed aside or ignored in the municipality's haste to avail itself of section 3. All action taken in disregard of this section 2, as interpreted by the Supreme Court of Florida, is void, being without authority of law—*no power is conferred by the act on the municipality to avail itself of the other provisions of the act.*

3. Nor does the statute itself contain any legislative determination of the benefits to take the place of these prerequisite jurisdictional findings by the governing authority of the municipality, as clearly appears from the ruling of the Florida Supreme Court in the Fort Myers case Supra, when it says:

> "In some jurisdictions, it is the rule that special or peculiar benefits actually accruing *and determined after a notice and hearing is essential to the validity of a special assessment,* while, in other jurisdictions, it is held that the presumption of special benefits grounded upon a legislative de-

termination thereof is sufficient to justify an assessment in proportion to the front footage or according to any other fair and reasonable rule. Dillon on Municipal Corporations, 5th Edition, Volume 4, page 2615. *The statute under consideration is controlled by the former rule.*" 17th Hdnt. City of Ft. Myers vs. State of Florida supra.

III.

ESTOPPEL

The holding of the Supreme Court of Florida in the instant case that appellants are estopped from urging the matters urged in defense of the suit can have no bearing on this appeal.

The defense here is based on the allegation of fact that the assessments sought to be enforced in the suit were made without authority and are wholly void; and estoppel cannot preclude the raising of the question of whether or not the assessments are wholly void.

It is almost universally held that, if the assessment is wholly void, estoppel does not obtain. The Supreme Court of Florida, itself, holds that way:

Gulfview Apartments, Inc. et al vs. City of Venice, 108 Fla. 41, 145 So. 842, where it is said,

> "When paving assessment is void, failure to object within time limited does not raise estoppel."

And in another place in the opinion:

> "We are conscious of the rule to the effect that the doctrine of estoppel has no application when an assessment is wholly void; that is to say, when the assessment is made in such a manner as to render it invalid, or when constitutional or statutory provisions essential to its validity are completely ignored." Gulfview Apartment vs. City of Venice, 108 Fla. 41, 145 So. 842.

Also in Combes vs. City of Coral Gables, 168 So. 524, 124 Fla. 374:

"Rule that taxpayer may waive his right or may be estopped to contest validity of tax lien is not applicable where lien is utterly void."

In the instant case the holding that appellants are estopped is expressly hypothecated on the alleged fact that the assessment is not void, as witness the following quotation from the opinion in the instant case:

> "*Bearing in mind the premise that no defects in the procedure culminating in the lien rendered them void,* we think the combined circumstances reflected in the record establish such acquiescence on the part of the appellee property owner that she may be said to have become estopped." (P. 57 of the original transcript of the record.)

IV.

CONCLUSION

Neither the Motion of Appellee to Dismiss or Affirm nor the opinion of the Court in the instant case anywhere contend that the jurisdictional prerequisities required before Section 3 and subsequent sections of the statute can be used, were complied with; but they both concern themselves entirely with the regularity of the resolution as to the *modus operandi* of levying the assessment itself as provided by Section 3 and subsequent sections of the statute in question, which is of no concern in this appeal in view of the fact that the use of these sections were entirely without authority of law.

Having fully shown that the grounds upon which appellees base their motion to dismiss or affirm are not adequate we would respectfully ask that the motion be denied.

Respectfully submitted,

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Attorney for Appellant.